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Supreme Court, U.S.
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NO.

in the Supreme Court of the United States

October Term, 1987

TALLAHASSEE BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Petitioners,

vs.

LEON COUNTY, FLORIDA, ET AL.,

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL APPENDIX

ROBERT E. WEISBERG
DAVID M. LIPMAN
LIPMAN & WEISBERG
5901 S.W. 74 Street
Suite 304
Miami, Florida 33143-5186
(305) 662-2600
ATTORNEYS FOR PETITIONERS

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TALLAHASSEE BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; ANITA L. DAVIS; HAROLD M. KNOWLES; NELSON E. BENNETT; MABLE J. SHERMAN; ARTHUR HUBBARD, III; RAYMOND THOMPSON; CHARLES U. SMITH; and LEONARD L. INGE, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TCA 83-7480-WS

FINAL JUDGMENT

LEON COUNTY, FLORIDA; DOUG NICHOLS, Chairman Commissioner; GAYLE NELSON; BOB HENDERSON; BILL MONTFORD; and LEE VAUSE, County Commissioners of Leon County, Florida, their successors and agents, all in their official capacities,

Defendants.
_____/

On December 22, 1983, the above named plaintiffs filed their complaint against the above named defendants alleging that at-large county-wide voting for all members of the Board of County Commis-

sioners of Leon County, Florida, minimizes black representation and participation and dilutes black voting strength in violation of their rights secured by the Voting Rights Act of 1965, as amended, Publ. L. No. 97-205, §3, 96 Stat. 134 (1982), amending 42 U.S.C. §1973, et seq. (hereinafter "Voting Rights Act") and the Fourteenth and Fifteenth Amendments to the United States Constitution.

On March 16, 1986, this court, based on defendants' stipulation that they would not contest plaintiffs' allegation that the at-large system violated Section 2 of the Voting Rights Act, entered an order stating that "the at-large election system utilized to elect members of the Board of County Commissioners of Leon County, Florida, has the effect of denying black citizens equal access to the political process in violation of Section 2 of the

Voting Rights Act, as amended, 42 U.S.C. §1983."

On June 2, 1986, based on the court's characterization of defendants' proposed remedial election plan as a "legislative plan" in contrast to a "judicially imposed plan," plaintiffs have stipulated that the election plan proposed by defendants, which consists of seven members, five of which are elected from single member districts and two elected at-large, complies with Section 2 of the Voting Rights Act.

For the reasons set forth in the accompanying memorandum decision, the court hereby enters this final judgment.

IT IS THEREFORE, ADJUDGED, AND DECREED AS FOLLOWS:

1. This decree extends to all issues set forth in the complaint in this matter and to the class of plaintiffs defined as all black residents of Leon County, Florida.

2. This court has jurisdiction over the subject matter of this action and the parties thereto.

3. Defendants are enjoined from utilizing an election system under which all five members of the County Commission are elected at-large.

4. The attached "Election Plan," Appendices 1 through 3, sets forth the plan for future elections for members of the Leon County Commission in accordance with the Voting Rights Act.

5. The "Election Plan" provides for a seven member Board of County Commissioners to be established as follows:

(a) Five (5) County Commissioners shall be elected from single member districts by a simple majority with a run-off election requirement in the primary, if necessary. The Five Commissioners elected by district shall be required to reside in the district from which they are elected.

(b) Two (2) County Commissioners shall be elected on an at-large basis by simple majority vote with a run-off

election requirement in the primary, if necessary. The two Commissioners elected at-large may reside anywhere in the County.

(c) Election for five (5) district seats will be held in the primary and general elections in the fall of 1986.

Two (2) district seats will be for two (2) year terms and the remaining three (3) districts will be for four (4) year terms, thereafter all terms will be for four years.

6. The attached Appendices 1 through 3 are fully incorporated herein as part of the "Election Plan." Appendix 1 contains the demographic characteristics of each of the five single member districts. Appendix 2 contains the legal description of the boundaries for each of the five single member districts. Appendix 3 establishes the implementation of this "Election Plan" including the schedule of elections and a timetable for candidate qualification for the 1986 elections.

Therefore, the court finds that the "Election Plan" described herein is a

proper remedy in this action, and is adopted and incorporated by reference into this final judgment as attached.

7. All elections henceforth will proceed as follows: Five members of the County Commission will be elected on a single member district basis; that is, all candidates in future elections for the district seats must reside in the district for which they seek election and only voters in that particular district shall cast ballots for the particular candidates from that district; and two members of the County Commission shall be elected on at-large basis and may reside anywhere in the County and are elected by a county-wide vote.

8. The plaintiffs are the prevailing party in this action, and are entitled, pursuant to the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973(e), and Civil Rights Attorney Fees Awards Act of 1976,

42 U.S.C. §1988, to an award of attorney fees and litigation expense reimbursement. Within twenty days of the issuance of this final judgment, plaintiffs should file applicable fee/expense submissions and an accompanying memorandum to this issue. Defendants shall respond within twenty days from plaintiffs' filing.

9. Jurisdiction is reserved for further action of this court necessary to carry out the terms of this judgment.

DONE and ORDERED this 13th day of June, 1986.

/s/
WILLIAM STAFFORD
Chief Judge

APPENDIX # 1

FIVE SINGLE MEMBER DISTRICTS COUNTY PLAN

DIST	BLK. POP.	%	BLK. V.A.P.	%	BLK. REG. VTS.	%	BLK. POP. IN DIST. %	WHT. POP.	%	WHT. V.A.P.	%	WHT. REG. VTS.	%
1	18,243	60.8	12,781	57.3	10,200	57.8	49.8	11,496	38.3	9,307	41.7	7,407	41.9
2	5,978	20.3	4,506	18.6	2,949	22.2	16.3	22,752	77.2	19,076	78.9	10,232	76.9
3	2,574	8.7	1,663	7.6	1,587	8.8	7.0	26,472	89.7	19,456	90.7	16,288	90.9
4	4,017	13.5	2,544	12.1	2,050	10.0	11.0	25,283	85.2	18,229	86.7	18,310	89.9
5	5,828	19.4	3,619	16.4	2,619	15.7	15.9	23,780	79.2	18,202	82.3	13,970	83.9
TOT	36,640	24.7	25,113	22.6	19,425	22.5	100.0	109,783	73.9	82,270	75.9	66,207	76.9

APPENDIX #2

A Commissioner shall be elected from each of the following described districts:

District One: All the territory encompassed by the following described boundary, to wit: Begin at the intersection of the centerlines of Tharpe Street and Monroe Street; thence Southerly along the centerline of Monroe Street to its intersection with the centerline of Perkins Street; thence West along the centerline of Perkins Street to its intersection with the centerline of Adams Street; thence Southerly along the centerline of Adams Street to its intersection with the centerline of Monroe Street; thence Southeasterly along the centerline of Monroe Street ;until it becomes Woodville Highway to its intersection with the centerline of Rhodes Cemetery Road; thence Easterly along the centerline

of Rhodes Cemetery Road to its intersection with the Power Transmission Line right of way that runs between Saint Marks and Tallahassee; thence Southeasterly along said Power Transmission Line Right of Way to its intersection with the centerline of Oak Ridge Road; thence East along the centerline of Oak Ridge Road to its intersection with the centerline of Taff Road; thence Southerly along the centerline of Taff Road to its intersection with the centerline of Natural Bridge Road; thence West along the centerline of Natural Bridge Road to its intersection with said Power Transmission Line Right of Way; thence Southeasterly approximately 1.75 miles along said Power Transmission Line Right of Way to its intersection with the centerline of an unnamed Dirt Road in the NE 1/4 of Section 28, T-2-S, R-1-E; thence Easterly 0.15 miles, Southerly 0.33 miles and Westerly 0.1

miles along the centerline of said Dirt Road to its intersection with the centerline of said Power Transmission Line Right of Way; thence Southeasterly along said Power Transmission Line Right of Way to its intersection with the boundary between Leon County, Florida and Wakulla County, Florida; thence West, Northerly, and West along said county boundary to its intersection with the centerline of National Forest Road (NFR) 309; thence Northerly along the centerline of NFR 309 to its intersection with NFR 360; thence Northerly along the centerline of NFR 360 to its intersection with the centerline of NFR 367; thence Northerly along the centerline of NFR 367 to its intersection with the centerline of State Road 267; thence Westerly along the centerline of State Road 267 to its intersection with the centerline of NFR 305; thence Easterly along the centerline of NFR 305 to its

intersection with the centerline of NFR 358; thence Northerly along the centerline of NFR 358 to its intersection with the centerline of NFR 370; thence Easterly along the centerline of NFR 370 to its intersection with the Florida Gas Transmission Line Right of Way; thence Southerly along the Florida Gas Transmission Line Right of Way to its intersection with the centerline of Dog Lake Tower Road; thence Easterly along the centerline of Dog Lake Tower Road to its intersection with the centerline of Springhill Road; thence Northerly along the centerline of Springhill Road until it becomes Lake Bradford Road and continuing Northerly along the centerline of Lake Bradford Road to its intersection with the centerline of Gaines Street; thence East along the centerline of Gaines Street to its intersection with Gay Street; thence North along the centerline of Gay Street

to its intersection with the centerline of Madison Street; thence East along the centerline of Madison Street to its intersection with the centerline of Copeland Street; thence North along the centerline of Copeland Street to its intersection with the centerline of Tennessee Street; thence Westerly along the centerline of Tennessee Street to its intersection with the centerline of Buena Vista Drive; thence North along the centerline of Buena Vista Drive to its intersection with the centerline of Green Tree Lane; thence West along the centerline of Green Tree Lane to its intersection with the centerline of High Road; thence North along the centerline of High Road to its intersection with the centerline of Tharpe Street; thence East along the centerline of Tharpe Street to its intersection with the centerline of Monroe Street, to the POINT OF BEGINNING.

District Two: All that territory encompassed by the following boundary, to wit: Begin at the intersection of the centerlines of Tennessee Street and Copeland Street; thence Westerly along the centerline of Tennessee Street to its intersection with the centerline of Seaboard System Railroad Right of Way; thence Northerly along the centerline of Seaboard System Railroad Right of Way to its intersection with the centerline of Tharpe Street; thence Westerly along the centerline of Tharpe Street to its intersection with the centerline of Capital Circle; thence South along the centerline of Capital Circle to its intersection with the centerline of Tennessee Street; thence Westerly along the centerline of Tennessee Street to its intersection with the boundary between Leon County, Florida and Gadsden County, Florida; thence Southwesterly along said county boundary to

its intersection with the boundary between Leon County, Florida and Wakulla County, Florida; thence East along said county boundary to its intersection with the centerline of NFR 309; thence Northerly along the centerline of NFR 309 to its intersection with NFR 360; thence Northerly along the centerline of NFR 360 to its intersection with the centerline of NFR 367; thence Northerly along the centerline of NFR 367 to its intersection with the centerline of State Road 267; thence Westerly along the centerline of State Road 267 to its intersection with the centerline of NFR 305; thence Easterly along the centerline of NFR 305 to its intersection with the centerline of NFR 358; thence Northerly along the centerline of NFR 358 to its intersection with the centerline of NFR 370; thence Easterly along the centerline of NFR 370 to its intersection with the Florida Gas

Transmission Line Right of Way; thence Southerly along the Florida Gas Transmission Line Right of Way to its intersection with the centerline of Dog Lake Tower Road; thence Easterly along the centerline of Dog Lake Tower Road to its intersection with the centerline of Springhill Road; thence Northerly along the centerline of Springhill Road until it becomes Lake Bradford Road and continue Northerly along the centerline of Lake Bradford Road to its intersection with the centerline of Gaines Street; thence East along the centerline of Gaines Street to its intersection with Gay Street; thence North along the centerline of Gay Street to its intersection with the centerline of Madison Street; thence East along the centerline of Madison Street to its intersection with the centerline of Copeland Street; thence North along the centerline of Copeland Street to its

intersection with the centerline of Tennessee Street, to the POINT OF BEGINNING.

District Three: All that territory encompassed by the following boundary, to wit: Begin at the intersection of the centerlines of Tennessee and Buena Vista Drive; thence Westerly along the centerline of Tennessee Street to its intersection with the centerline of Seaboard System Railroad Right of Way; thence Northerly along the centerline of the Seaboard System Railroad Right of Way to its intersection with the centerline of Tharpe Street; thence Westerly along the centerline of Tharpe Street to its intersection with the centerline of Capital Circle; thence South along the centerline of Capital Circle to its intersection with the centerline of Tennessee Street; thence Westerly along the centerline of Tennessee Street to its intersection with

the boundary between Leon County, Florida and Gadsden County, Florida; thence Northeasterly along said county boundary to its intersection with the stream that runs into the Ochlockonee River in Section 4, T-2-N, R-1-W; thence Easterly along said stream to its intersection with the centerline of Orchard Pond Road; thence Easterly along the centerline of Orchard Pond Road to its intersection with the centerline of Meridian Road; thence Southerly along the centerline of Meridian Road to its intersection with the centerline of Tharpe Street; thence West along the centerline of Tharpe Street to its intersection with the centerline of High Road; thence South along the centerline of High Road to its intersection with the centerline of Green Tree Lane; thence East along the centerline of Green Tree Lane to its intersection with the centerline of Buena Vista Drive; thence South along

the centerline of Buena Vista Drive to its intersection with the centerline of Tennessee Street, to the POINT OF BEGINNING.

District Four: All that territory encompassed by the following described boundary, to wit: Begin at the intersection of the centerlines of Monroe Street and Tharpe Street; thence Southerly along the centerline of Monroe Street to its intersection with the centerline of Tennessee Street; thence Easterly along the centerline of Tennessee Street until it becomes Mahan Drive and continue Easterly on Mahan Drive to its intersection with the centerline of Magnolia Drive; thence Northerly along the centerline of Magnolia Drive to its intersection with the centerline of Miccosukee Road; thence Easterly along the centerline of Miccosukee Road to its intersection with the centerline of

Capital Circle; thence Northerly along the centerline of Capital Circle to its intersection with the centerline of Centerville Road; thence Northeasterly along the centerline of Centerville Road to its intersection with the centerline of Interstate Highway 10; thence Easterly along the centerline of Interstate Highway 10 to its intersection with the boundary between Leon County, Florida and Jefferson County, Florida; thence North, East, and Northerly along said county boundary to its intersection with the boundary between Leon County, Florida and Thomas County, Georgia; thence Westerly along said county boundary to its intersection with the boundary between Leon County, Florida and Grady County, Georgia; thence Westerly along said county boundary to its intersection with the boundary between Leon County, Florida and Gadsden County, Florida; thence Southerly along said

The election of the Commissioners from even numbered districts shall be for a term of two years and from odd numbered districts shall be for a term of four years. Thereafter all terms shall be for four years.

The two incumbent County Commissioners having unexpired terms after the General Election of 1986 shall serve as the at-large Commissioners for the remainder of their terms. In the General Election of 1988, one at-large Commissioner election shall be for a term of two years and one shall be for a term of four years. Thereafter all terms shall be for four years.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TALLAHASSEE BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiffs,

CIVIL ACTION NO. TCA 83-7480

vs.

LEON COUNTY, FLORIDA, et al.,

Defendants.
_____/

MEMORANDUM DECISION

THIS CAUSE is before this Court on the issue of the appropriate remedial election plan for the Leon County Board of County Commissioners. The present at-large plan was invalidated by order of this Court dated March 16, 1986, pursuant to the Defendants' stipulation that they would not defend the existing at-large election system against Plaintiffs complaint that the plan violated Section 2 of the Voting Rights Act.

Trial on the remedy was scheduled to commence June 2, 1986. On May 30, 1986, pursuant to motions of both parties, this Court agreed to rule on the issue of whether the "mixed plan" proposed by the Defendants was to be evaluated as "legislative" or "court-ordered." Decisions of the Supreme Court indicate that "court-ordered" plans must adhere to stricter standards than those proposed by legislative bodies.

Plaintiffs concede that the Defendants' plan calling for the Board of County Commissioners to be elected for five single member and two at-large seats complies with Section 2 of the Voting Rights Act. They contend, however, that because the county lacks the authority under state law to change its election system absent voter approval, the Defendants cannot propose a plan to the Court as a legislative plan. Plaintiffs'

position is that any plan adopted by this Court, regardless of its origin, must comply with the special requirements for court-ordered plans, most specifically, the requirement that absent special circumstances, such plan contain only single-member districts. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 639 (1956). For the reasons set out below, I reject Plaintiffs' contention, and find the plan offered by the Defendants to be "legislative" and thus entitled to the deference normally afforded legislative judgment in apportionment matters. In light of Plaintiffs' concession that the proposed plan complies with the Voting Rights Act, it is hereby ordered that said plan be put into effect in the next regularly scheduled election.

Florida Law on Election Options Available to Counties

Prior to November, 1984, an at-large election system was the only method of election available to non-charter counties, such as Leon. Florida Constitution, Article VIII § 1(e). In 1984, the Constitution was amended to remove this limitation and to allow commissioners to be elected as provided by law. In 1985, Section 124.011 (Fla. Stat. [1985]) was enacted to allow non-charter counties the option of five single member districts, or a seven person Board, five elected from districts and two elected at-large. Absent voter approval pursuant to a referendum, however, all non-charter counties were to retain at-large elections.

Unlike non-charter counties, charter counties are not limited to the methods

of election set out in Florida Statutes, Chap. 124. On October 2, 1985 this Court granted Defendants' Motion for Continuance to allow the County Commission to submit to the voters a change to charter government, to be elected pursuant to a 4-3 mixed election plan. The change was rejected by the voters.[1] Thus, Leon County remains a non-charter county and as such is limited to the methods of election set out by statute, and may voluntarily change methods only with approval of the voters.

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[1]In their pretrial memorandum on the issue before me, the Plaintiffs indicate that the voters rejected a proposal similar to the plan Defendants now offer. From this they conclude that the voters have spoken, and the Commission should not be allowed to circumvent their judgment. It is not clear what the voters were rejecting. The change to charter county status may have been the important factor rather than the mixed plan. This Court cannot assume that just because the voters rejected a charter calling for one mixed system that they likewise would reject another mixed system which is available to non-charter counties. The voters could just as easily be seen as favoring retention of the at-large system, an option no longer open to them.

Applicable Law

Starting with Connor v. Johnson, 402 U.S. 690 (1971) the Supreme Court recognized that election plans imposed by federal courts on state and local governments must comply with stricter standards than those derived from legislative mandates. Lacking the political mandate to identify and reconcile competing state policies, a federal court has less latitude than does the legislative body. Absent special circumstances, court ordered plans must achieve population equality with only deminimus variation, Chapman v. Meier, 420 U.S. 1 (1975), and absent special circumstances, must avoid the imposition of multi-member districts. Id. at 19.

The stricter standards for court ordered plans do not, however, become applicable until such time as the court is called upon to substitute its judgment for that

of the legislative body. The Supreme Court has consistently recognized that apportionment is a legislative matter. Reynolds v. Sims, 377 US. 533 (1964); Upham v. Seamon, 456 US.. 37 (1982). Until the point is reached where the legislature is unwilling or unable to act, the Court is to defer to the legislative judgment. Even when an existing scheme has been judicially invalidated, it is appropriate to allow the legislative body to adopt a substitute. Wise v. Lipscomb, 437 U.S. 535 (1978).

Plaintiffs have agreed that Defendants' proposed plan complies with the Voting Rights Act. "But for" the absence of specific authority of counties to change their method of election, there would be agreement that the plan proposed by the Defendants is a legislative plan. Plaintiffs maintain, however, the absence of this authority removes any requirement

that this Court consider it to be a legislative plan.

Although the Supreme Court earlier had distinguished between "court-ordered" and "legislative" plans, in terms of applicable standards, the first delineation of the distinction appeared in Wise v. Lipscomb, 437 U.S. 535 (1978). Wise was a dilution case in which the City of Dallas, Texas conceded that its at-large election plan diluted minority voting strength. The city was allowed to propose a substitute. The district court accepted the City's mixed plan as "legislative." The Court of Appeals reversed, holding it was court ordered. The Supreme Court reinstated the district court opinion. There was no majority opinion in Wise. Six members of the Court believed the plan to be legislative, but they split 4 to 2 on the issue of the importance of Dallas' authority to apportion itself.

Justice White announced the ruling of this Court and wrote an opinion joined only by Justice Stewart. In their opinion, Dallas had the requisite authority. Justice Powell wrote a separate concurring opinion in which the Chief Justice, Justices Blackmun, and Rehnquist joined. Justice Powell was of the view that the authority of the City of Dallas to apportion itself was immaterial to the issue of whether the plan should be classified as legislative. Rather, the inquiry was whether the plan reflected the policy choices of the people's elected representatives. (Justices Marshall, Brennan, and Stevens dissented.)

In McDaniel v. Sanchez, 452 U.S. 130 (1981) the Court again considered the definition of "legislative" plan. McDaniel involved the question of when a plan produced in response to federal court litigation must be pre-cleared under

Section 5 of the Voting Rights Act. The Court elected to answer the question by classifying the plan. A legislative plan must be pre-cleared. A court ordered plan is not subject to Section 5. To classify the plan, the Court turned to Wise, and adopted Justice Powell's definition of "legislative":

> As Justice Powell pointed out in Wise v. Lipscomb, supra, the essential characteristics of a legislative plan is the exercise of legislative judgment. The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic. The applicability of Section 5 to specific remedial plans is a matter of federal law that federal courts should determine pursuant to a uniform federal law.
>
> 425 U.S. at 144

While Plaintiffs are correct in their assertion that the only issue before the McDaniel court was whether the plan was "legislative" for purposes of pre-

clearance, there is little support for their belief that the Court would adopt a different definition of "legislative" when the issue is the degree of deference due policy judgments made by local governmental bodies. Not a single member of the Court chose to limit the definition to the issue before the Court. Furthermore, as a matter of federal law, there is no justification for having the application of federal standards be determined by chance variations in state law, particularly when state law never contemplated the involvement of a federal court in the apportionment process.

The only courts to actually confront the issue have concluded that McDaniel's definition of "legislative" applies in non-Section 5 cases as well. See Judge Arnow's opinion in McMillan v. Escambia County, 559 F.Supp. 720, 724 (1984): "Justice Powell's concept as a principle

has equal force whether it is applied in a voting dilution suit or in a Section 5 pre-clearance suit." See also Farnum v. Burns, 561 F.Supp. 83, 92 (1983): "Deference to the defendants' plan is particularly appropriate in light of this Court's ruling at trial that it is legislative plan. This conclusion was based on [McDaniel]." (Farnum involved the apportionment of the Rhode Island Legislature, a jurisdiction not subject to Section 5 coverage.)

Plaintiffs rely on an opinion rendered by a panel of the Fifth Circuit in McMillan v. Escambia County, 688 F.2d 860 (1982), a decision rendered prior to Judge Arnow's Opinion cited above. In that case, which makes no mention of McDaniel, the Court concludes that under the controlling analysis of Wise, (which the Court finds to be Justice White's

opinion)[2], a plan cannot be legislative if the body proposing it lacks the authority under state law to apportion itself. Plaintiffs conclude that the panel deciding McMillan must have concluded that McDaniel was not applicable since McDaniel was decided over a year earlier. Equally plausible is the view adopted by Judge Arnow in Escambia on remand: "It [McDaniel] was not mentioned in the Appellate Court's decision for rehearing and, so this Court is advised, the parties to the appeal did not call it to the Appellate Court's attention." 559 F.Supp. at 723.

Even if Plaintiff is correct that McDaniel is not direct authority for this

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[2]The Court arrived at Justice White's opinion as controlling on the assumption that the three dissenters, who believed the plan in that case to be "court ordered," would take Justice White's more restrictive view of "legislative," rather than the more expansive view adopted by the four Justices in the other opinion.

case, it is at the very least persuasive authority for the definition of a legislative plan. Furthermore, four sitting members of the Supreme Court would, under Wise, label Defendants' plan "legislative." In light of these facts, McMillan cannot be seen as controlling authority.

CONCLUSION

The plan proposed by the Leon County Commission is the product of legislative judgment. It is a legislative plan regardless of whether the Commission has the authority under state law to apportion itself. Plaintiffs have agreed that the plan complies with Section 2 of the Voting Rights Act, and is, therefore, not dilutive. The primary rationale behind prohibiting at-large seats is to avoid submerging minority voting strength. Since Plaintiffs concede that no dilution will result from their inclusion, it is

difficult to imagine what federal policy would be furthered by this Court's imposition of an all single membered district plan.

The remedial plan adopted by the County Commission will be put into effect by order of the Court.

/s/
WILLIAM STAFFORD
Chief Judge

Dated: June 13, 1986

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DAVID M. LIPMAN
LIPMAN & WEISBERG
5901 S.W. 74 Street
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On March 16, 1986, this court, based on defendants' stipulation that they would not contest plaintiffs' allegation that the at-large system violated Section 2 of the Voting Rights Act, entered an order stating that "the at-large election system utilized to elect members of the Board of County Commissioners of Leon County, Florida, has the effect of denying black citizens equal access to the political process in violation of Section 2 of the

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On June 2, 1986, based on the court's characterization of defendants' proposed remedial election plan as a "legislative plan" in contrast to a "judicially imposed plan," plaintiffs have stipulated that the election plan proposed by defendants, which consists of seven members, five of which are elected from single member districts and two elected at-large, complies with Section 2 of the Voting Rights Act.

For the reasons set forth in the accompanying memorandum decision, the court hereby enters this final judgment.

IT IS THEREFORE, ADJUDGED, AND DECREED AS FOLLOWS:

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> (b) Two (2) County Commissioners shall be elected on an at-large basis by simple majority vote with a run-off

election requirement in the primary, if necessary. The two Commissioners elected at-large may reside anywhere in the County.

(c) Election for five (5) district seats will be held in the primary and general elections in the fall of 1986.

Two (2) district seats will be for two (2) year terms and the remaining three (3) districts will be for four (4) year terms, thereafter all terms will be for four years.

6. The attached Appendices 1 through 3 are fully incorporated herein as part of the "Election Plan." Appendix 1 contains the demographic characteristics of each of the five single member districts. Appendix 2 contains the legal description of the boundaries for each of the five single member districts. Appendix 3 establishes the implementation of this "Election Plan" including the schedule of elections and a timetable for candidate qualification for the 1986 elections.

Therefore, the court finds that the "Election Plan" described herein is a

proper remedy in this action, and is adopted and incorporated by reference into this final judgment as attached.

7. All elections henceforth will proceed as follows: Five members of the County Commission will be elected on a single member district basis; that is, all candidates in future elections for the district seats must reside in the district for which they seek election and only voters in that particular district shall cast ballots for the particular candidates from that district; and two members of the County Commission shall be elected on at-large basis and may reside anywhere in the County and are elected by a county-wide vote.

8. The plaintiffs are the prevailing party in this action, and are entitled, pursuant to the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973(e), and Civil Rights Attorney Fees Awards Act of 1976,

42 U.S.C. §1988, to an award of attorney fees and litigation expense reimbursement. Within twenty days of the issuance of this final judgment, plaintiffs should file applicable fee/expense submissions and an accompanying memorandum to this issue. Defendants shall respond within twenty days from plaintiffs' filing.

9. Jurisdiction is reserved for further action of this court necessary to carry out the terms of this judgment.

DONE and ORDERED this 13th day of June, 1986.

/s/
WILLIAM STAFFORD
Chief Judge

APPENDIX # 1

FIVE SINGLE MEMBER DISTRICTS COUNTY PLAN

DIST	BLK. POP.	%	BLK. V.A.P.	%	BLK. REG. VTS.	%	BLK. POP. IN DIST. %	WHT. POP.	%	WHT. V.A.P.	%	WHT. REG. VTS.	%
1	18,243	60.8	12,781	57.3	10,200	57.8	49.8	11,496	38.3	9,307	41.7	7,407	41.9
2	5,978	20.3	4,506	18.6	2,949	22.2	16.3	22,752	77.2	19,076	78.9	10,232	76.9
3	2,574	8.7	1,663	7.6	1,587	8.8	7.0	26,472	89.7	19,456	90.7	16,288	90.9
4	4,017	13.5	2,544	12.1	2,050	10.0	11.0	25,283	85.2	18,229	86.7	18,310	89.9
5	5,828	19.4	3,619	16.4	2,619	15.7	15.9	23,780	79.2	18,202	82.3	13,970	83.9
TOT	36,640	24.7	25,113	22.6	19,425	22.5	100.0	109,783	73.9	82,270	75.9	66,207	76.9

APPENDIX #2

A Commissioner shall be elected from each of the following described districts:

District One: All the territory encompassed by the following described boundary, to wit: Begin at the intersection of the centerlines of Tharpe Street and Monroe Street; thence Southerly along the centerline of Monroe Street to its intersection with the centerline of Perkins Street; thence West along the centerline of Perkins Street to its intersection with the centerline of Adams Street; thence Southerly along the centerline of Adams Street to its intersection with the centerline of Monroe Street; thence Southeasterly along the centerline of Monroe Street ;until it becomes Woodville Highway to its intersection with the centerline of Rhodes Cemetery Road; thence Easterly along the centerline

of Rhodes Cemetery Road to its intersection with the Power Transmission Line right of way that runs between Saint Marks and Tallahassee; thence Southeasterly along said Power Transmission Line Right of Way to its intersection with the centerline of Oak Ridge Road; thence East along the centerline of Oak Ridge Road to its intersection with the centerline of Taff Road; thence Southerly along the centerline of Taff Road to its intersection with the centerline of Natural Bridge Road; thence West along the centerline of Natural Bridge Road to its intersection with said Power Transmission Line Right of Way; thence Southeasterly approximately 1.75 miles along said Power Transmission Line Right of Way to its intersection with the centerline of an unnamed Dirt Road in the NE 1/4 of Section 28, T-2-S, R-1-E; thence Easterly 0.15 miles, Southerly 0.33 miles and Westerly 0.1

miles along the centerline of said Dirt Road to its intersection with the centerline of said Power Transmission Line Right of Way; thence Southeasterly along said Power Transmission Line Right of Way to its intersection with the boundary between Leon County, Florida and Wakulla County, Florida; thence West, Northerly, and West along said county boundary to its intersection with the centerline of National Forest Road (NFR) 309; thence Northerly along the centerline of NFR 309 to its intersection with NFR 360; thence Northerly along the centerline of NFR 360 to its intersection with the centerline of NFR 367; thence Northerly along the centerline of NFR 367 to its intersection with the centerline of State Road 267; thence Westerly along the centerline of State Road 267 to its intersection with the centerline of NFR 305; thence Easterly along the centerline of NFR 305 to its

intersection with the centerline of NFR 358; thence Northerly along the centerline of NFR 358 to its intersection with the centerline of NFR 370; thence Easterly along the centerline of NFR 370 to its intersection with the Florida Gas Transmission Line Right of Way; thence Southerly along the Florida Gas Transmission Line Right of Way to its intersection with the centerline of Dog Lake Tower Road; thence Easterly along the centerline of Dog Lake Tower Road to its intersection with the centerline of Springhill Road; thence Northerly along the centerline of Springhill Road until it becomes Lake Bradford Road and continuing Northerly along the centerline of Lake Bradford Road to its intersection with the centerline of Gaines Street; thence East along the centerline of Gaines Street to its intersection with Gay Street; thence North along the centerline of Gay Street

to its intersection with the centerline of Madison Street; thence East along the centerline of Madison Street to its intersection with the centerline of Copeland Street; thence North along the centerline of Copeland Street to its intersection with the centerline of Tennessee Street; thence Westerly along the centerline of Tennessee Street to its intersection with the centerline of Buena Vista Drive; thence North along the centerline of Buena Vista Drive to its intersection with the centerline of Green Tree Lane; thence West along the centerline of Green Tree Lane to its intersection with the centerline of High Road; thence North along the centerline of High Road to its intersection with the centerline of Tharpe Street; thence East along the centerline of Tharpe Street to its intersection with the centerline of Monroe Street, to the POINT OF BEGINNING.

District Two: All that territory encompassed by the following boundary, to wit: Begin at the intersection of the centerlines of Tennessee Street and Copeland Street; thence Westerly along the centerline of Tennessee Street to its intersection with the centerline of Seaboard System Railroad Right of Way; thence Northerly along the centerline of Seaboard System Railroad Right of Way to its intersection with the centerline of Tharpe Street; thence Westerly along the centerline of Tharpe Street to its intersection with the centerline of Capital Circle; thence South along the centerline of Capital Circle to its intersection with the centerline of Tennessee Street; thence Westerly along the centerline of Tennessee Street to its intersection with the boundary between Leon County, Florida and Gadsden County, Florida; thence Southwesterly along said county boundary to

its intersection with the boundary between Leon County, Florida and Wakulla County, Florida; thence East along said county boundary to its intersection with the centerline of NFR 309; thence Northerly along the centerline of NFR 309 to its intersection with NFR 360; thence Northerly along the centerline of NFR 360 to its intersection with the centerline of NFR 367; thence Northerly along the centerline of NFR 367 to its intersection with the centerline of State Road 267; thence Westerly along the centerline of State Road 267 to its intersection with the centerline of NFR 305; thence Easterly along the centerline of NFR 305 to its intersection with the centerline of NFR 358; thence Northerly along the centerline of NFR 358 to its intersection with the centerline of NFR 370; thence Easterly along the centerline of NFR 370 to its intersection with the Florida Gas

Transmission Line Right of Way; thence Southerly along the Florida Gas Transmission Line Right of Way to its intersection with the centerline of Dog Lake Tower Road; thence Easterly along the centerline of Dog Lake Tower Road to its intersection with the centerline of Springhill Road; thence Northerly along the centerline of Springhill Road until it becomes Lake Bradford Road and continue Northerly along the centerline of Lake Bradford Road to its intersection with the centerline of Gaines Street; thence East along the centerline of Gaines Street to its intersection with Gay Street; thence North along the centerline of Gay Street to its intersection with the centerline of Madison Street; thence East along the centerline of Madison Street to its intersection with the centerline of Copeland Street; thence North along the centerline of Copeland Street to its

intersection with the centerline of Tennessee Street, to the POINT OF BEGINNING.

District Three: All that territory encompassed by the following boundary, to wit: Begin at the intersection of the centerlines of Tennessee and Buena Vista Drive; thence Westerly along the centerline of Tennessee Street to its intersection with the centerline of Seaboard System Railroad Right of Way; thence Northerly along the centerline of the Seaboard System Railroad Right of Way to its intersection with the centerline of Tharpe Street; thence Westerly along the centerline of Tharpe Street to its intersection with the centerline of Capital Circle; thence South along the centerline of Capital Circle to its intersection with the centerline of Tennessee Street; thence Westerly along the centerline of Tennessee Street to its intersection with

the boundary between Leon County, Florida and Gadsden County, Florida; thence Northeasterly along said county boundary to its intersection with the stream that runs into the Ochlockonee River in Section 4, T-2-N, R-1-W; thence Easterly along said stream to its intersection with the centerline of Orchard Pond Road; thence Easterly along the centerline of Orchard Pond Road to its intersection with the centerline of Meridian Road; thence Southerly along the centerline of Meridian Road to its intersection with the centerline of Tharpe Street; thence West along the centerline of Tharpe Street to its intersection with the centerline of High Road; thence South along the centerline of High Road to its intersection with the centerline of Green Tree Lane; thence East along the centerline of Green Tree Lane to its intersection with the centerline of Buena Vista Drive; thence South along

the centerline of Buena Vista Drive to its intersection with the centerline of Tennessee Street, to the POINT OF BEGINNING.

District Four: All that territory encompassed by the following described boundary, to wit: Begin at the intersection of the centerlines of Monroe Street and Tharpe Street; thence Southerly along the centerline of Monroe Street to its intersection with the centerline of Tennessee Street; thence Easterly along the centerline of Tennessee Street until it becomes Mahan Drive and continue Easterly on Mahan Drive to its intersection with the centerline of Magnolia Drive; thence Northerly along the centerline of Magnolia Drive to its intersection with the centerline of Miccosukee Road; thence Easterly along the centerline of Miccosukee Road to its intersection with the centerline of

Capital Circle; thence Northerly along the centerline of Capital Circle to its intersection with the centerline of Centerville Road; thence Northeasterly along the centerline of Centerville Road to its intersection with the centerline of Interstate Highway 10; thence Easterly along the centerline of Interstate Highway 10 to its intersection with the boundary between Leon County, Florida and Jefferson County, Florida; thence North, East, and Northerly along said county boundary to its intersection with the boundary between Leon County, Florida and Thomas County, Georgia; thence Westerly along said county boundary to its intersection with the boundary between Leon County, Florida and Grady County, Georgia; thence Westerly along said county boundary to its intersection with the boundary between Leon County, Florida and Gadsden County, Florida; thence Southerly along said

The election of the Commissioners from even numbered districts shall be for a term of two years and from odd numbered districts shall be for a term of four years. Thereafter all terms shall be for four years.

The two incumbent County Commissioners having unexpired terms after the General Election of 1986 shall serve as the at-large Commissioners for the remainder of their terms. In the General Election of 1988, one at-large Commissioner election shall be for a term of two years and one shall be for a term of four years. Thereafter all terms shall be for four years.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TALLAHASSEE BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,

Plaintiffs,

CIVIL ACTION NO. TCA 83-7480

vs.

LEON COUNTY, FLORIDA, et al.,

Defendants.
_____/

MEMORANDUM DECISION

THIS CAUSE is before this Court on the issue of the appropriate remedial election plan for the Leon County Board of County Commissioners. The present at-large plan was invalidated by order of this Court dated March 16, 1986, pursuant to the Defendants' stipulation that they would not defend the existing at-large election system against Plaintiffs complaint that the plan violated Section 2 of the Voting Rights Act.

Trial on the remedy was scheduled to commence June 2, 1986. On May 30, 1986, pursuant to motions of both parties, this Court agreed to rule on the issue of whether the "mixed plan" proposed by the Defendants was to be evaluated as "legislative" or "court-ordered." Decisions of the Supreme Court indicate that "court-ordered" plans must adhere to stricter standards than those proposed by legislative bodies.

Plaintiffs concede that the Defendants' plan calling for the Board of County Commissioners to be elected for five single member and two at-large seats complies with Section 2 of the Voting Rights Act. They contend, however, that because the county lacks the authority under state law to change its election system absent voter approval, the Defendants cannot propose a plan to the Court as a legislative plan. Plaintiffs'

position is that any plan adopted by this Court, regardless of its origin, must comply with the special requirements for court-ordered plans, most specifically, the requirement that absent special circumstances, such plan contain only single-member districts. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 639 (1956). For the reasons set out below, I reject Plaintiffs' contention, and find the plan offered by the Defendants to be "legislative" and thus entitled to the deference normally afforded legislative judgment in apportionment matters. In light of Plaintiffs' concession that the proposed plan complies with the Voting Rights Act, it is hereby ordered that said plan be put into effect in the next regularly scheduled election.

Florida Law on Election Options Available to Counties

Prior to November, 1984, an at-large election system was the only method of election available to non-charter counties, such as Leon. Florida Constitution, Article VIII § 1(e). In 1984, the Constitution was amended to remove this limitation and to allow commissioners to be elected as provided by law. In 1985, Section 124.011 (Fla. Stat. [1985]) was enacted to allow non-charter counties the option of five single member districts, or a seven person Board, five elected from districts and two elected at-large. Absent voter approval pursuant to a referendum, however, all non-charter counties were to retain at-large elections.

Unlike nom-charter counties, charter counties are not limited to the methods

of election set out in Florida Statutes, Chap. 124. On October 2, 1985 this Court granted Defendants' Motion for Continuance to allow the County Commission to submit to the voters a change to charter government, to be elected pursuant to a 4-3 mixed election plan. The change was rejected by the voters.[1] Thus, Leon County remains a non-charter county and as such is limited to the methods of election set out by statute, and may voluntarily change methods only with approval of the voters.

---

[1]In their pretrial memorandum on the issue before me, the Plaintiffs indicate that the voters rejected a proposal similar to the plan Defendants now offer. From this they conclude that the voters have spoken, and the Commission should not be allowed to circumvent their judgment. It is not clear what the voters were rejecting. The change to charter county status may have been the important factor rather than the mixed plan. This Court cannot assume that just because the voters rejected a charter calling for one mixed system that they likewise would reject another mixed system which is available to non-charter counties. The voters could just as easily be seen as favoring retention of the at-large system, an option no longer open to them.

Applicable Law

Starting with Connor v. Johnson, 402 U.S. 690 (1971) the Supreme Court recognized that election plans imposed by federal courts on state and local governments must comply with stricter standards than those derived from legislative mandates. Lacking the political mandate to identify and reconcile competing state policies, a federal court has less latitude than does the legislative body. Absent special circumstances, court ordered plans must achieve population equality with only deminimus variation, Chapman v. Meier, 420 U.S. 1 (1975), and absent special circumstances, must avoid the imposition of multi-member districts. Id. at 19.

The stricter standards for court ordered plans do not, however, become applicable until such time as the court is called upon to substitute its judgment for that

of the legislative body. The Supreme Court has consistently recognized that apportionment is a legislative matter. Reynolds v. Sims, 377 US. 533 (1964); Upham v. Seamon, 456 US.. 37 (1982). Until the point is reached where the legislature is unwilling or unable to act, the Court is to defer to the legislative judgment. Even when an existing scheme has been judicially invalidated, it is appropriate to allow the legislative body to adopt a substitute. Wise v. Lipscomb, 437 U.S. 535 (1978).

Plaintiffs have agreed that Defendants' proposed plan complies with the Voting Rights Act. "But for" the absence of specific authority of counties to change their method of election, there would be agreement that the plan proposed by the Defendants is a legislative plan. Plaintiffs maintain, however, the absence of this authority removes any requirement

that this Court consider it to be a legislative plan.

Although the Supreme Court earlier had distinguished between "court-ordered" and "legislative" plans, in terms of applicable standards, the first delineation of the distinction appeared in Wise v. Lipscomb, 437 U.S. 535 (1978). Wise was a dilution case in which the City of Dallas, Texas conceded that its at-large election plan diluted minority voting strength. The city was allowed to propose a substitute. The district court accepted the City's mixed plan as "legislative." The Court of Appeals reversed, holding it was court ordered. The Supreme Court reinstated the district court opinion. There was no majority opinion in Wise. Six members of the Court believed the plan to be legislative, but they split 4 to 2 on the issue of the importance of Dallas' authority to apportion itself.

Justice White announced the ruling of this Court and wrote an opinion joined only by Justice Stewart. In their opinion, Dallas had the requisite authority. Justice Powell wrote a separate concurring opinion in which the Chief Justice, Justices Blackmun, and Rehnquist joined. Justice Powell was of the view that the authority of the City of Dallas to apportion itself was immaterial to the issue of whether the plan should be classified as legislative. Rather, the inquiry was whether the plan reflected the policy choices of the people's elected representatives. (Justices Marshall, Brennan, and Stevens dissented.)

In McDaniel v. Sanchez, 452 U.S. 130 (1981) the Court again considered the definition of "legislative" plan. McDaniel involved the question of when a plan produced in response to federal court litigation must be pre-cleared under

Section 5 of the Voting Rights Act. The Court elected to answer the question by classifying the plan. A legislative plan must be pre-cleared. A court ordered plan is not subject to Section 5. To classify the plan, the Court turned to Wise, and adopted Justice Powell's definition of "legislative":

> As Justice Powell pointed out in Wise v. Lipscomb, supra, the essential characteristics of a legislative plan is the exercise of legislative judgment. The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic. The applicability of Section 5 to specific remedial plans is a matter of federal law that federal courts should determine pursuant to a uniform federal law.
>
> 425 U.S. at 144

While Plaintiffs are correct in their assertion that the only issue before the McDaniel court was whether the plan was "legislative" for purposes of pre-

clearance, there is little support for their belief that the Court would adopt a different definition of "legislative" when the issue is the degree of deference due policy judgments made by local governmental bodies. Not a single member of the Court chose to limit the definition to the issue before the Court. Furthermore, as a matter of federal law, there is no justification for having the application of federal standards be determined by chance variations in state law, particularly when state law never contemplated the involvement of a federal court in the apportionment process.

The only courts to actually confront the issue have concluded that McDaniel's definition of "legislative" applies in non-Section 5 cases as well. See Judge Arnow's opinion in McMillan v. Escambia County, 559 F.Supp. 720, 724 (1984): "Justice Powell's concept as a principle

has equal force whether it is applied in a voting dilution suit or in a Section 5 pre-clearance suit." See also Farnum v. Burns, 561 F.Supp. 83, 92 (1983): "Deference to the defendants' plan is particularly appropriate in light of this Court's ruling at trial that it is legislative plan. This conclusion was based on [McDaniel]." (Farnum involved the apportionment of the Rhode Island Legislature, a jurisdiction not subject to Section 5 coverage.)

Plaintiffs rely on an opinion rendered by a panel of the Fifth Circuit in McMillan v. Escambia County, 688 F.2d 860 (1982), a decision rendered prior to Judge Arnow's Opinion cited above. In that case, which makes no mention of McDaniel, the Court concludes that under the controlling analysis of Wise, (which the Court finds to be Justice White's

opinion)[2], a plan cannot be legislative if the body proposing it lacks the authority under state law to apportion itself. Plaintiffs conclude that the panel deciding McMillan must have concluded that McDaniel was not applicable since McDaniel was decided over a year earlier. Equally plausible is the view adopted by Judge Arnow in Escambia on remand: "It [McDaniel] was not mentioned in the Appellate Court's decision for rehearing and, so this Court is advised, the parties to the appeal did not call it to the Appellate Court's attention." 559 F.Supp. at 723.

Even if Plaintiff is correct that McDaniel is not direct authority for this

[2]The Court arrived at Justice White's opinion as controlling on the assumption that the three dissenters, who believed the plan in that case to be "court ordered," would take Justice White's more restrictive view of "legislative," rather than the more expansive view adopted by the four Justices in the other opinion.

case, it is at the very least persuasive authority for the definition of a legislative plan. Furthermore, four sitting members of the Supreme Court would, under Wise, label Defendants' plan "legislative." In light of these facts, McMillan cannot be seen as controlling authority.

CONCLUSION

The plan proposed by the Leon County Commission is the product of legislative judgment. It is a legislative plan regardless of whether the Commission has the authority under state law to apportion itself. Plaintiffs have agreed that the plan complies with Section 2 of the Voting Rights Act, and is, therefore, not dilutive. The primary rationale behind prohibiting at-large seats is to avoid submerging minority voting strength. Since Plaintiffs concede that no dilution will result from their inclusion, it is

difficult to imagine what federal policy would be furthered by this Court's imposition of an all single membered district plan.

The remedial plan adopted by the County Commission will be put into effect by order of the Court.

/s/
WILLIAM STAFFORD
Chief Judge

Dated: June 13, 1986

(3)

Supreme Court, U.S.
FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-1495

No. _____

In the
Supreme Court
of the
United States
October Term, 1987

TALLAHASSEE BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Petitioners,

vs.

LEON COUNTY, FLORIDA, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KATHARINE I. BUTLER
UNIVERSITY OF SOUTH CAROLINA
COLLEGE OF LAW
COLUMBIA, SOUTH CAROLINA 29208

F.E. STEINMEYER, III
VICKERS & MULDOON
424 EAST CALL STREET
TALLAHASSEE, FLORIDA 32301
ATTORNEYS FOR RESPONDENTS'
LEON COUNTY, FLORIDA, ET AL

February 1988

38 pp

QUESTIONS PRESENTED

1. Whether a remedial apportionment plan proposed by a local government as a replacement for it's existing plan, which was held to violate Section 2 of the Voting Rights Act, loses it's character as a "legislative plan" because state law makes no provision for changes in methods of electing county government except by voter referendum.

2. Whether a single definition of "legislative plan," -- that set out in McDaniel v. Sanchez, 452 U.S. 130 (1981) -- should apply in all voting rights litigation.

Petitioners are:

Tallahassee Branch of the National Association for the Advancement of Colored People; Anita L. Davis; Harold M. Knowles; Nelson E. Bennett; Mabel J. Sherman; Arthur Hubbard, III,; Raymond Thompson; Charles U. Smith; and Leonard L. Inge, on behalf of themselves and all others similarly situated.

Respondents are:

Leon County, Florida; Lee Vause, Chairman Commissioner; Gayle Nelson; Robert K. Henderson; William J. Montford; Henry Lewis, III; Don C. Price; and Gary Yordon, County Commissioners of Leon County, Florida, their successors and agents, all in their official capacities.

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In the
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Petitioners,
vs.

LEON COUNTY, FLORIDA, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, LEON COUNTY, FLORIDA, ET AL., assert that the opinion of the United States Court of Appeals for the Eleventh Circuit Court was correct and does not present any grounds for review by the Court that are within the spirit of Supreme Court Rule 17.

OPINIONS BELOW

The opinion of the Court of Appeals, dated September 21, 1987, is reported at 827 F. 2d 1436. Petitioners have included a reprinted version of the opinion in the Appendix to their Petition. However, their reprint contains serious typographical errors, including omissions of words, sentences, and paragraphs. A correct copy of the opinion is contained herein as Appendix A.

STATUTORY PROVISIONS INVOLVED

Although the case below was brought under Section 2 of the Voting Rights Act, 42 U.S.C. Sec. 1973, as amended, no issue concerning that act is raised by the petition. Petitioners concede that the plan proposed by the Defendants below and adopted by the District Court complies with the requirements of Section 2.

STATEMENT OF THE CASE

In the case below, brought under Section 2 of the Voting Rights Act, Plaintiffs challenged the method of electing the Leon County Board of County Commissioners. There was no trial on the merits because the Defendants conceded that the existing at-large method of electing the County Commission diluted the voting strength of the county's black citizens. Upon Plaintiffs' concession that the Defendants proposed mixed plan (five single member districts, two at-large seats) complied with the Voting Rights Act, its implementation was ordered by the District Court. The District Court considered the plan proposed by the Defendants to be "legislative", and evaluated it accordingly.

The sole issue raised by the petitioners in the trial court, in the Court of Appeals, and in this Petition,

is whether the replacement apportionment plan proposed by the Leon County was entitled to the deference normally afforded "legislative" plans. Petitioners contend that the plan should not be considered to be "legislative" because Leon County, as a non-charter county, can voluntarily change its method of election only through a referendum. Petitioners further contend that the courts below were mistaken in their reliance upon this Court's definition of a "legislative plan" set out in McDaniel v. Sanchez, 452 U.S. 130 (1981).

REASONS FOR DENYING THE PETITION

Petitioners seek review of the decision of the court below on the grounds that (1) it is contrary to a decision of this court; (2) it is in conflict with a decision from another circuit; and (3) it raises important issues concerning the substantive

standards that govern remedial apportionment plans, to wit, whether the courts below erred in concluding that an apportionment plan offered by a governmental entity that lacks the authority under state law to change its electoral system, absent voter approval, is entitled to the deference normally afforded legislative plans.

The decision below is not contrary to the decisions of this court. It is not in conflict with a decision from another circuit. The decision does involve an important matter of federal law, but the issue it raises has been implicitly, if not expressly, decided by this Court in a manner consistent with the decision below, and with the decisions of a majority of the lower courts that have considered the issue.

A. The decision of the court below to defer to the legislative judgment of

the County Commission is in accord with decisions of this Court.

Since Reynolds v. Sims, 377 U.S. 533 (1964), the Court has recognized that matters of apportionment are best left to legislative bodies. Even when an existing scheme has been judicially invalidated, it is appropriate to allow the legislative body to adopt a substitute. Wise v. Lipscomb, 437 U.S. 535 (1978). In recognition of the principle, the District Court allowed the Board of County Commissioners to propose a replacement for the County's at-large election scheme invalidated under the Voting Rights Act. Petitioners contend that was in error because the long standing rule of deferring to the legislature does not apply to a legislative body that lacks the authority under state law to change the method by which it is elected. In the

absence of this authority, Petitioners contend, the legislative body's proposed remedy is entitled to no special deference, and any plan adopted must comply with the requirements for "court-ordered" plans, including the requirement of all single member districts.

Petitioners concede that under this Court's most recent decisions defining "legislative plans," McDaniel v. Sanchez, 452 U.S. 130 (1981), the plan proposed by the Leon County Board of County Commissioners and adopted by the District Court is legislative. They argue, however, that McDaniel is not controlling because it should be limited to its facts.

The issue in McDaniel was whether a reapportionment plan adopted in response to federal court litigation was subject to the preclearance requirements of Section 5 of the Voting Rights Act. This Court elected to answer that question by

classifying the plan. A legislative plan must be pre-cleared; a court ordered plan is not subject to Section 5. To classify the plan at issue in McDaniel, this Court turned to Wise v. Lipscomb, 437 U.S. 535 (1978), a case in which the issue was the deference a federal court was to afford a remedial apportionment plan proposed by a local governing body. This Court adopted the following language from Justice Powell's opinion in that case:

> ..the essential characteristic of a legislative plan is the exercise of legislative judgment.
>
> The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic. 425 U.S. at 144

Petitioners correctly assert that the only issue in McDaniel was whether the

plan was "legislative" for preclearance purposes. However, their further assertion -- that the definition should be limited to answering the preclearance issue, and a different definition employed when the issue is the degree of deference due policy judgments made by local governmental bodies -- is without merit. Not a single member of the Court chose to limit the definition to the issue before the Court.

Unquestionably, the policy basis for McDaniel was that of providing the broadest possible coverage for Section 5, thereby assuring that all election law changes in jurisdictions subject to its provisions obtain the specialized federal scrutiny required therein. It is also beyond question, however, that this Court resolved that issue by classifying the plan as legislative, and the definition selected came from Wise in which the issue was not the application of Section

5, but whether the plan proposed by the City, a defendant in a vote dilution case, was entitled to deference as a legislative plan.

Petitioners contend that rather than following this Court's definition in McDaniel, which was taken directly from Justice Powell's opinion in Wise, the courts below should have followed the arguably different definition of "legislative" found in Justice White's opinion in Wise. In Wise, the City of Dallas conceded that its at-large election plan diluted minority voting strength in the City. The City proposed a remedial plan that contained a mixture of single-member and at-large seats. This plan was adopted by the District Court as a legislative plan. Lipscomb v. Wise, 399 F. Supp. 782, 792 (N.D. Tex. 1975). The Court of Appeals reversed, holding, in reliance on East Carroll Parish v. Marshall, 424 U.S. 636 (1976), that the

plan was court ordered, and thus could not include at-large seats. Lipscomb v. Wise, 551 F. 2d 1043 (5th Cir. 1977). This Court reinstated the judgment of the district court.

The six members of the Court who agreed that the plan in Wise was legislative split four to two as to the basis for that consideration. In the opinion subsequently followed in McDaniel, Justice Powell, joined by the Chief Justice, Justices Blackmun, and Rehnquist, wrote that "the rule of deference to local legislative judgments remains in force even if our examination of state law suggests that the local body lacks authority to reapportion itself." 437 U.S. at 548. The key inquiry, he stated, is whether the body "exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal

court." Id.

Petitioners contend that the controlling opinion in Wise is not that of Justice Powell, but rather the opinion written by Justice White, who was joined only by Justice Stewart. In defining the plan before the Court as legislative, Justice White apparently felt compelled to distinguished the Court's decision in East Carroll Parish. There the Court held that the all-single member district plan ordered into effect by the lower court was not subject to Section 5 preclearance because it was "court-ordered." The distinguishing factor, according to Justice White, was that the defendants in East Carroll"...did not purport to reapportion themselves and, furthermore, could not even legally do so under federal law because state legislation providing them with such powers had been disapproved (under Section 5)..." 437 U.S. at 545. The situation was different

in Dallas, because, while the power to reapportion was not specifically granted to the City, it was not specifically disallowed either.

Justice White had already concluded that the City had the authority to apportion itself. Therefore, he did not have to decide whether the absence of such authority would deprive the City's proposed remedy of the normal deference afforded legislative bodies in apportionment matters. Thus, Petitioners have misleadingly characterized the holding in Wise as being "that a remedial reapportionment plan proposed by a local governing body cannot be considered a legislative plan and accorded the deference applicable to legislatively adopted plans if the political body proposing the plan lacks legal power to apportion itself." Brief of the Petitioners, 15. It is true that Justice Powell characterized Justice White's view

of East Carroll Parish as compelling such a conclusion ("..Mr. Justice White's statement that East Carroll School Bd. stands for the proposition that a plan submitted by a political body without power to reapportion itself cannot be considered a legislative plan..." 437 U.S. 535), and was, because of his reading, prompted to write a separate opinion to voice his disagreement. Justice White's opinion is, however, subject to other interpretations -- particularly in light of his having subsequently voted with the majority in McDaniel.

The decision of the courts below classifying the plan at issue here as "legislative" is consistent with McDaniel, and with one of the opinions rendered in Wise. It is not clearly inconsistent with the other opinion from Wise. That McDaniel should be controlling in all definitions of

"legislative" is not a matter of confusion in the lower courts. A majority of courts to actually confront the issue are in accord with the decision of the Eleventh Circuit Court of Appeals in this case. See McMillan v. Escambia County, 559 F. Supp. 720, 724 (N.D. Fla. 1983): "Justice Powell's concept as a principle has equal force whether it is applied in a voting dilution suit or in a Section 5 pre-clearance suit." See also, Farnum v. Burns, 561 F. Supp. 83, 92 (D. R.I. 1983): "Deference to the defendants' plan is particularly appropriate in light of this Court's ruling at trial that it is a legislative plan. This conclusion was based on [McDaniel]. "See also, Potter v. Washington County, Florida, 653 F. Supp. 121, 125 (N.D. Fla. 1986).

B. The decision below is not in conflict with a decision of another circuit.

Petitioners assert that the decision below is in conflict with an en banc decision of the Fifth Circuit, League of United Latin American Citizens Council No. 4386 v. Midland Independent School Dist., 829 F. 2d 546 (5th Cir. 1987). The defendant School Board offered several mixed plans to replace its at-large election plan invalidated under Section 2 of the Voting Rights Act. Under Texas law, all such plans were required to allocate no fewer than 70% of the board members to single member districts. None of the Board's proposals met that requirement. Thus, the Board's proposed plans were substantively in violation of state law, and in actual derogation of the higher authority of the state legislature to mandate methods of election for local governments. The Fifth Circuit refused to extend the notion of deference to the legislative body that far.

The plan at issue here is clearly distinguishable. Florida law specifically allows non-charter counties to elect their governing bodies from five/two "mixed" plans. The substantive decision concerning the remedial plan was clearly consistent with the policy of the legislature. Missing in Florida law is a provision for a non-charter county to change its method of election without voter approval. Seeking voter approval of the method proposed in this case was not practical, since there was a significant possibility that the voters would have voted to retain the at-large system, invalid under Section 2 of the Voting Rights Act. Compliance with the procedure for changing the method of election was impossible under the circumstances. The procedure set out by the legislature would not have been any better followed had the District Court adopted the plan proposed by the

Plaintiffs.

C. The decision below did not sanction an evasion of state policy by a local government.

Petitioners' contention that in defering to the Commissioners the courts below sanctioned a plan "enacted in violation of state law and state legislative policies" (Brief of Petitioners, 20) is totally without merit. On the issue of the appropriate body to make changes in election laws, state law and policy is to place that decision in the hands of the electorate. Furthermore, the policy is to leave in place at-large elections for non-charter counties unless the voters elect a change. Federal law invalidated the retention of at-large elections for Leon County. The decision concerning whether to change election methods has thus been

taken from the voters -- not by the actions of the Commissioners, but by the operation of the Voting Rights Act. To call for a referendum at this point is impractical, unless "retention of at-large elections is removed as an option for the voters.[1]

When faced with an involuntary change in methods of electing county government, Florida law expresses no preference or policy concerning who should make that the decision in the voters' stead. Absent some evidence of a contrary state policy, the Federal policy of deference to the

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[1]Petitioners have not suggested that there be a referendum for the voters to decide. Rather they suggest that because the referendum was not held, the Petitioners should select the method of electing Leon County's governing body. They do not explain why this would be more consistent with state law than leaving the decision to the Board of County Commissioners.

legislative body should prevail. In selecting the five/two mixed system, the Board of County Commissioners has selected a method of election endorsed by the state legislature for non-charter counties, and has retained as much of the at-large election system favored by state law as federal law will allow.

CONCLUSION

In defering to the legislative judgment of the Board of County Commissioners on the matter of a remedial election plan, the Eleventh Circuit Court of Appeals has adhered to a long line of decisions of this Court. It has faithfully applied this Court's most recent definition of "legislative plan", set out in McDaniel, and its interpretation of that case is consistent with that of the other lower courts to consider the issue. In the absence of conflict with decisions of this Court, and in the apparent absence of confusion

among the lower courts concerning the controlling authority of McDaniel on the issue of defining "legislative plans", no further review of this case is needed and the petition for certiorari should be denied.

Respectfully submitted,

KATHARINE I. BUTLER
UNIVERSITY OF
SOUTH CAROLINA
COLLEGE OF LAW
COLUMBIA, SOUTH CAROLINA
29208

F.E. STEINMEYER, III
VICKERS & MULDOON
424 EAST CALL STREET
TALLAHASSEE, FL
32301

ATTORNEYS FOR RESPONDENTS'
LEON COUNTY, FLORIDA, ET AL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true and correct copies of the foregoing has been furnished by U.S. Mail this 26th day of February, 1988, to Robert E. Weisberg and David M. Lipman, 5901 S.W. 74th Street, Miami, Florida, 33143-5186, Attorneys for Plaintiffs; and Katharine I. Butler, University of South Carolina, College of Law, Columbia, South Carolina, 29208.

F.E. Steinmeyer, III
Attorney at Law

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TALLAHASSEE BRANCH OF THE NATIONAL ASSOCIATON FOR THE ADVANCEMENT OF COLORED PEOPLE, et. al.,

Plaintiff,

v.

LEON COUNTY, FLORIDA, et. al.,

Defendant.

CIVIL ACTION NO. TCA 83-7480

MEMORANDUM DECISION

THIS CAUSE is before this Court on the issue of the appropriate remedial election plan for the Leon County Board of County Commissioners. The present at-large plan was invalidated by order of this Court dated March 16, 1986, pursuant to the Defendants' stipulation that they would not defend the existing at-large election system against Plaintiffs complaint that the plan violated Section 2 of the Voting Rights Act.

Trial on the remedy was scheduled to commence June 2, 1986. On May 30, 1986, pursuant to motions of both

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parties, this Court agreed to rule on the issue of whether the "mixed plan" proposed by the Defendants was to be evaluated as "legislative" or "court-ordered". Decisions of the Supreme Court indicate that "court-ordered" plans must adhere to stricter standards than those proposed by legislative bodies.

Plaintiffs concede that the Defendants' plan calling for the Board of County Commissioners to be elected for five single member and two at-large seats complies with Section 2 of the Voting Rights Act. They contend, however, that because the county lacks the authority under state law to change its election system absent voter approval, the Defendants cannot propose a plan to the Court as a legislative plan. Plaintiffs' position is that any plan adopted by this Court, regardless of its origin, must comply with the special requirements for court-ordered plans, most specifically, the requirement that absent special circumstances, such plan contain only single-member districts. East Carroll Parish School Board v. Marshall, 424 U.S. 636, 639 (1956). For the reasons set out below, I reject Plaintiffs' contention, and find the plan offered by the Defendants to be "legislative" and thus entitled to the deference normally afforded legislative judgment in apportionment matters. In light of Plaintiffs' concession

that the proposed plan complies with the Voting Rights Act, it is hereby ordered that said plan be put into effect in the next regularly scheduled election.

Florida Law on Election Options Available to Counties

Prior to November, 1984, an at-large election system was the only method of election available to non-charter counties, such as Leon. Florida Constitution, Article VIII § 1(e). In 1984, the Constitution was amended to remove this limitation and to allow commissioners to be elected as provided by law. In 1985, Section 124.011 (Fla. Stat. [1985]) was enacted to allow non-charter counties the option of five single member districts, or a seven person Board, five elected from districts and two elected at-large. Absent voter approval pursuant to a referendum, however, all non-charter counties were to retain at-large elections.

Unlike non-charter counties, charter counties are not limited to the methods of election set out in Florida Statutes, Chap. 124. On October 2, 1985 this Court granted Defendants' Motion for Continuance to allow the County Commission to submit to the voters a change to charter government, to be elected pursuant to a 4-3 mixed election

plan. The change was rejected by the voters.[1] Thus, Leon County remains a non-charter county and as such is limited to the methods of election set out by statute, and may voluntarily change methods only with approval of the voters.

Applicable Law

Starting with Conner v. Johnson, 402 U.S. 690 (1971) the Supreme Court recognized that election plans imposed by federal courts on state and local governments must comply with stricter standards than those derived from legislative mandates. Lacking the political mandate to identify and reconcile competing state policies, a federal court has less latitude than does the legislative body. Absent special circumstances, court ordered plans must

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[1] In their pre-trial memorandum on the issue before me, the Plaintiffs indicate that the voters rejected a proposal similar to the plan Defendants now offer. From this they conclude that the voters have spoken, and the Commission should not be allowed to circumvent their judgment. It is not clear what the voters were rejecting. The change to charter county status may have been the important factor rather than the mixed plan. This Court cannot assume that just because the voters rejected a charter calling for one mixed system that they likewise would reject another mixed system which is available to non-charter counties. The voters could just as easily be seen as favoring retention of the at-large system, an option no longer open to them.

achieve population equality with only deminimus variation Chapman v. Meier, 420 U.S. 1 (1975), and absent special circumstances, must avoid the imposition of multi-member districts. Id. at 19.

The stricter standards for court ordered plans do not, however, become applicable until such time as the court is called upon to substitute its judgment for that of the legislative body. The Supreme Court has consistently recognized that apportionment is a legislative matter. Reynolds v. Sims, 377 U.S. 533 (1964); Upham v. Seamon, 456 U.S. 37 (1982). Until the point is reached where the legislature is unwilling or unable to act, the Court is to defer to the legislative judgment. Even when an existing scheme has been judicially invalidated, it is appropriate to allow the legislative body to adopt a substitute. Wise v. Lipscomb, 437 U.S. 535 (1978).

Plaintiffs have agreed that Defendants' proposed plan complies with the Voting Rights Act. "But for" the absence of specific authority of counties to change their method of election, there would be agreement that the plan proposed by the Defendants is a legislative plan. Plaintiffs maintain, however, the absence of this authority removes any requirement that this Court consider it to be a legislative plan.

Although the Supreme Court earlier had distinguished between "court-ordered" and "legislative" plans, in terms of applicable standards, the first delineation of the distinction appeared in Wise v. Lipscomb, 437 U.S. 535 (1978). Wise was a dilution case in which the City of Dallas, Texas conceded that its at-large election plan diluted minority voting strength. The city was allowed to propose a substitute. The district court accepted the City's mixed plan as "legislative". The Court of Appeals reversed, holding it was court ordered. The Supreme Court reinstated the district court opinion. There was no majority opinion in Wise. Six members of the Court believed the plan to be legislative, but they split 4 to 2 on the issue of the importance of Dallas' authority to apportion itself. Justice White announced the ruling of the Court and wrote an opinion joined only by Justice Stewart. In their opinion, Dallas had the requisite authority. Justice Powell wrote a separate concurring opinion in which the Chief Justice, Justices Blackmun, and Rehnquist joined. Justice Powell was of the view that the authority of the City of Dallas to apportion itself was immaterial to the issue of whether the plan should be classified as legislative. Rather, the inquiry was whether the plan reflected the

policy choices of the people's elected representatives. (Justices Marshall, Brennan, and Stevens dissented.)

In McDaniel v. Sanchez, 452 U.S. 130 (1981) the Court again considered the definition of "legislative" plan. McDaniel involved the question of when a plan produced in response to federal court litigation must be pre-cleared under Section 5 of the Voting Rights Act. The Court elected to answer the question by classifying the plan. A legislative plan must be pre-cleared. A court ordered plan is not subject to Section 5. To classify the plan, the Court turned to Wise, and adopted Justice Powell's definition of "legislative":

> As Justice Powell pointed out in Wise v. Lipscomb, supra, the essential characteristics of a legislative plan is the exercise of legislative judgment. The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic. The applicability of Section 5 to specific remedial plans is a matter of federal law that federal courts should determine pursuant to a uniform federal law.
>
> 425 U.S. at 144

While Plaintiffs are correct in their assertion that the only issue before the McDaniel court was whether the plan was "legislative" for purposes of pre-clearance, there is little support for their belief that the Court

would adopt a different definition of "legislative" when the issue is the degree of deference due policy judgments made by local governmental bodies. Not a single member of the Court chose to limit the definition to the issue before the Court. Furthermore, as a matter of federal law, there is no justification for having the application of federal standards be determined by chance variations in state law, particularly when state law never contemplated the involvement of a federal court in the apportionment process.

The only courts to actually confront the issue have concluded that McDaniel's definition of "legislative" applies in non-Section 5 cases as well. See Judge Arnow's opinion in McMillan v. Escambia County, 559 F.Supp. 720, 724 (1984): "Justice Powell's concept as a principle has equal force whether it is applied in a voting dilution suit or in a Section 5 pre-clearance suit." See also Farnum v. Burns, 561 F.Supp 83, 92 (1983): "Deference to the defendants' plan is particularly appropriate in light of this Court's ruling at trial that it is a legislative plan. This conclusion was based on [McDaniel]." (Farnum involved the apportionment of the Rhode Island Legislature, a jurisdiction not subject to Section 5 coverage.)

Plaintiffs rely on an opinion rendered by a panel of the Fifth Circuit in McMillan v. Escambia County, 688

F.2d 860 (1982), a decision rendered prior to Judge Arnow's Opinion cited above. In that case, which makes no mention of McDaniel, the Court concludes that under the controlling analysis of Wise, (which the Court finds to be Justice White's opinion)[2], a plan cannot be legislative if the body proposing it lacks the authority under state law to apportion itself. Plaintiffs conclude that the panel deciding McMillan must have concluded that McDaniel was not applicable since McDaniel was decided over a year earlier. Equally plausible is the view adopted by Judge Arnow in Escambia on remand: "It [McDaniel] was not mentioned in the Appellate Court's decision for rehearing and, so this Court is advised, the parties to the appeal did not call it to the Appellate Court's attention." 559 F.Supp. at 723.

Even if Plaintiff is correct that McDaniel is not direct authority for this case, it is at the very least persuasive authority for the definition of a legislative plan. Furthermore, four sitting members of the Supreme Court would, under Wise, label Defendants' plan

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[2] The Court arrived at Justice White's opinion as controlling on the assumption that the three dissenters, who believed the plan in that case to be "court ordered", would take Justice White's more restrictive view of "legislative," rather than the more expansive view adopted by the four Justices in the other opinion.

"legislative." In light of these facts, McMillan cannot be seen as controlling authority.

CONCLUSION

The plan proposed by the Leon County Commission is the product of legislative judgment. It is a legislative plan regardless of whether the Commission has the authority under state law to apportion itself. Plaintiffs have agreed that the plan complies with Section 2 of the Voting Rights Act, and is, therefore, not dilutive. The primary rationale behind prohibiting at-large seats is to avoid submerging minority voting strength. Since Plaintiffs concede that no dilution will result from their inclusion, it is difficult to imagine what federal policy would be furthered by this Court's imposition of an all single membered district plan.

The remedial plan adopted by the County Commission will be put into effect by order of the Court.

June 13, 1986

William Stafford

WILLIAM STAFFORD
Chief Judge

Supreme Court, U.S.
FILED
OCT 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1495

In the Supreme Court of the United States

OCTOBER TERM, 1988

TALLAHASSEE BRANCH OF THE NAACP, ET AL., PETITIONERS

v.

LEON COUNTY, FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
MARK L. GROSS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

24pp

QUESTION PRESENTED

Whether a federal court, faced with the task of approving a remedial election plan to replace one it has invalidated under Section 2 of the Voting Rights Act, should defer to a mixed (at-large and single member) plan that complies with Section 2, when the plan was prepared by the local governing body but was not presented for referendum approval as required by state law.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In December 1983, petitioners, representing black voters in Leon County, Florida, filed suit against respondents, the County and certain of its officials, alleging that the at-large election of all five members of the Leon County Commission diluted the voting strength of black voters, in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973 (Supp. App. 1-2).

Leon County is a non-charter county under Florida law.[1] In 1985, while this action was pending, Florida

[1]A non-charter county has only "such power of self-government as is provided by general or special law" (Fla. Const. art. VIII, § 1(f)).

enacted legislation that permitted non-charter counties to establish five-member County Commissions, to be elected from single-member districts, or seven-member Commissions, to have five members elected from single-member districts and two elected at-large.[2] The selection of either the five-member single-district plan or the seven-member mixed plan by a non-charter county required the approval of voters in a referendum. Absent such approval, non-charter counties had to retain at-large elections. Supp. App. 25. In contrast, charter counties under Florida law have the power to establish voting systems not specifically described by Florida legislation (*id.* at 25-26).[3]

In October 1985, the district court granted respondents' request for a continuance of trial in order to present a referendum to voters on election issues. The proposal was to change Leon County from a non-charter county to a charter county, and to establish a seven-member County Commission, with four members elected from single-member districts and three elected at-large (Pet. App. A3, A7; Supp. App. 26). In February 1986, voters rejected the proposal (*ibid.*).

The respondents then stipulated that they would not contest petitioners' claim that the existing at-large system violated Section 2 of the Voting Rights Act (Supp. App. 2, 22). On March 16, 1986, the district court ruled that the at-large system violated

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[2] The legislation, Fla. Stat. Ann. § 124.011 (West 1972 & Supp. 1985), implemented an amendment to the Florida Constitution that permitted commissioners to be elected as provided by law. Before the amendment of the Florida Constitution in November 1984, non-charter counties had to use at-large election systems. Supp. App. 25.

[3] Charter counties have "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors" (Fla. Const. art. VIII, § 1(g)).

Section 2 and scheduled a trial on the remedy (*id.* at 22-23). Before the remedy trial, respondent Leon County Commission proposed a remedial plan to the court to establish a seven-member Commission, with five members elected from single-member districts and two at-large (Pet. App. A17 (Godbold, J., dissenting); Supp. App. 3). Petitioners conceded that respondents' plan complied with Section 2, but objected to it as an improper remedy (Supp. App. 3, 23). Petitioners proposed a remedial plan that would establish a five-member Commission, all elected from single-member districts (Pet. App. A17-A18 (Godbold, J., dissenting)).

2. The district court ordered the implementation of the mixed plan proposed by respondents (Supp. App. 1-36). Petitioners had contended that the court should reject the plan because, under state law, the county lacked power to enact it without voter approval. Because the plan had not been approved by referendum, petitioners argued that the court could not give to respondents' proposal the deference due under this Court's cases to remedial plans that are legislatively formulated (*id.* at 23). In petitioner's view, the absence of a valid "legislative" plan constrained the court to apply this Court's precedents for court-devised plans that require, absent special circumstances, that such plans contain only single member districts (*id.* at 24 (citing *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636, 639 (1976)).

The district court rejected this argument. Citing this Court's decisions in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), and *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), the court held that the five/two plan submitted by the County Commissioners was a "legislative" plan even though the County Commission did not have independent authority under state law to reapportion itself absent voter approval (Supp. App.

29-35). The court found that "[t]he plan proposed by the Leon County Commission is the product of legislative judgment" (*id.* at 35), and thus that the single member district requirement for court-ordered plans was not applicable. The court reasoned that "[t]he primary rationale behind prohibiting at-large seats is to avoid submerging minority voting strength" (*ibid.*). Because petitioners "concede that no dilution will result from th[e] inclusion [of at-large seats], it is difficult to imagine what federal policy would be furthered by this Court's imposition of an all single membered district plan" (*id.* at 35-36).

3. A divided court of appeals affirmed (Pet. App. A1-A46, 827 F.2d 1436).[4] The court began its analysis by noting that "when a reapportionment plan is judicially imposed by the district court, single member districts are preferred," whereas "when a reapportionment plan is drafted by a legislative body of the state, the plan is not always required to be restricted to single member districts" (827 F.2d at 1438). The court explained that "[p]rinciples of federalism and common sense mandate deference to a plan which has been legislatively enacted" (*ibid.*). The court then examined whether respondents' plan should be considered legislatively enacted, despite the County Commission's lack of independent authority to implement the five/two plan it preferred (*ibid.*).

The court noted that this Court in *Wise* v. *Lipscomb*, *supra*, had considered a similar issue, although a majority of the Court did not join in a single opinion. Justice White, the court explained, had announced the Court's judgment and concluded that the

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[4] Because the appendix to the petition omitted a portion of the court of appeals' opinion, we will cite to the reported opinion and not to the opinion reproduced in the appendix.

plan in that case, which included at-large seats, was legislative because the local body had power to enact it (827 F.2d at 1438). Justice Powell, joined by three other Justices, had written a separate opinion in *Wise* concluding that "whether the city council had authority under state law to enact the proposed plan was irrelevant," and "whenever a reapportionment plan is submitted by the elected representatives of the people, that plan should be given deference" (827 F.2d at 1439). The court then noted that the Supreme Court's later decision in *McDaniel* v. *Sanchez*, *supra*, which involved the applicability of the preclearance requirement of Section 5 of the Voting Rights Act (42 U.S.C. 1973c) to a remedial plan prepared by a local body for court approval, "implies that Justice Powell's concurrence has been adopted by a majority of the Court" (827 F.2d at 1439). The court stated that this Court in *McDaniel* "concluded that the plan at issue was legislatively enacted regardless of whether the state legislative body possessed such authority under state law" (827 F.2d at 1439). The court then applied the *McDaniel* test for a "legislative" plan to Leon County's proposal because it did "not believe the Supreme Court would adopt different definitions of 'legislatively enacted' for purposes of section 2 and section 5" of the Voting Rights Act (*id.* at 1440). The court added that "a broad definition of 'legislatively enacted' leaves reapportionment to be performed by a legislative body of the state rather than the federal judiciary" (*ibid.*).[5]

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[5] The court of appeals refused to follow an earlier Fifth Circuit decision, *McMillan* v. *Escambia County*, 688 F.2d 960 (1982), vacated on other grounds, 466 U.S. 48 (1984), which had held that a plan proposed by a county commission that did not have authority under state law to reapportion itself was

Judge Godbold dissented (827 F.2d at 1440-1447). He maintained that the applicable standards were those developed in Justice White's opinion in *Wise* v. *Lipscomb*, *supra*. Under that approach, Leon County's plan was "not a legislative plan as it was not enacted pursuant to the commissioners' authority but rather in derogation of their authority" (827 F.2d at 1444). He added that, in his view, the plan in this case would not be considered legislative even under Justice Powell's opinion in *Wise* because "the means to reapportion [via referendum] had been granted and were available but were not utilized" by Leon County (827 F.2d at 1445). The dissent distinguished *McDaniel* v. *Sanchez*, *supra*, because that case had involved only the interpretation of Section 5 of the Voting Rights Act (827 F.2d at 1446).

DISCUSSION

In our view, the courts below acted properly in giving deference to respondents' plan, notwithstanding that it was proposed by a state governmental body without independent authority to put such a plan into effect. The decision below does not conflict with any decision of this Court, and, although the reasoning of the Eleventh Circuit is not entirely consistent with that of a decision of the Fifth Circuit, the difference in outcome in that case can also be explained by its significantly different facts. While the court of appeals' opinion does leave some uncertainty about the essential characteristics of a legislative plan, at present the issue neither is encountered frequently enough nor is of sufficient importance in the formulation of voting rights remedies to warrant this Court's review.

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not a legislative plan. The court of appeals did not view itself bound by *McMillan* because that decision was vacated by this Court on other grounds (827 F.2d at 1440).

1. This Court has long recognized that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion" (*Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964)). See *Burns* v. *Richardson*, 384 U.S. 73, 85 (1966); *Chapman* v. *Meier*, 420 U.S. 1, 26 (1974); *McDaniel* v. *Sanchez*, 452 U.S. 130, 138-139, 150 n.30 (1981).[6] "[L]egislative plans are likely to reflect a State's political policy and the will of its people more accurately than a decision by unelected federal judges" (*Connor* v. *Finch*, 431 U.S. 407, 431 (1977) (Powell, J., dissenting)). Remedial plans proposed by state legislative bodies may include multimember districts or at-large seats provided that the use of such seats does not violate federal statutory and constitutional voting protections.[7] *Wise* v. *Lipscomb*, 437 U.S. 535 (1978)

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[6] State bodies retain the primary role because "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality" (*Connor* v. *Finch*, 431 U.S. 407, 414-415 (1977)). It is only when a legislature fails to apportion itself consistently with its own policies and federal requirements that "a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task" (*id.* at 415). See also *Upham* v. *Seamon*, 456 U.S. 37 (1982) (per curiam); *Cook* v. *Luckett*, 735 F.2d 912, 918-919 (5th Cir. 1984) (upholding deference to legislative plan, noting that "[w]hile the maps depicting its result may seem odd, Madison County's political process involved just the sort of give-and-take between citizens and their elected officials that federal courts are unable to achieve").

[7] While recognizing that "multimember districts and at-large voting schemes may operate to minimize or cancel out

(allowing legislative remedy of eight single-member districts and three at-large seats for city council); *Burns* v. *Richardson*, 384 U.S. 73 (1966) (upholding state legislature's remedial plan for electing one chamber of a bicameral legislature from multimember districts).

When a federal court must devise its own remedial plan, however, the Court has instructed that "unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation" (*Chapman* v. *Meier*, 420 U.S. 1, 26-27 (1974) (footnote omitted)). The Court has explained that "[b]ecause the practice of multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorties, this Court has concluded that single-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result" (*Connor* v. *Finch*, 431 U.S. at 415.[8]

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the voting strength of racial [minorities in] the voting population," (*Thornburg* v. *Gingles*, 478 U.S. 30, 47 (1986) (quotation marks omitted; brackets in original)), this Court has never held that at-large or multimember election systems are per se unconstitutional. See *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *Fortson* v. *Dorsey*, 379 U.S. 433 (1965).

[8] *Connor* followed a well-settled line of this Court's precedents regarding federal remedial principles, and its rule applies to local election plans as well as to state legislative and congressional districts. See *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636, 639 (1976) ("[w]e have frequently reaffirmed the rule that when United States district courts

2. Under this Court's decisions, it is therefore necessary to identify whether a proposed remedial plan is "legislative" or "court-ordered," to determine whether at-large districts (that are consistent with Section 2 and the Constitution) may be included. In the remedial context, the conclusion that a plan is legislative results in deference by the federal court to the inclusion of at-large districts. The characterization of a remedial reapportionment plan as legislative or judicial is also relevant to determining whether preclearance is required under Section 5 of the Voting Rights Act (42 U.S.C. 1973c). In the Section 5 context, the conclusion that a plan is legislative means, in a covered jurisdiction, that the plan is subject to the preclearance requirement before it can go into effect.[9] This Court has addressed the definition of a legislative plan in both of these contexts, and those decisions support the conclusion of the court below that respondents' plan was a legislative one.

In *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), the Court considered whether a remedial plan proposed by a local body was legislative or court-ordered in determining the acceptability of its inclusion of at-

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are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances"); *Chapman* v. *Meier*, 420 U.S. at 21; *Mahan* v. *Howell*, 410 U.S. 315, 333 (1973); *Connor* v. *Johnson*, 402 U.S. 690, 692 (1971) (per curiam) ("when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter"); *Connor* v. *Williams*, 404 U.S. 549, 551 (1972) (same). See also *Upham* v. *Seamon*, 456 U.S. 37, 42-43 (1982).

[9] Plans prepared and adopted by a federal court to remedy a constitutional violation are not subject to preclearance under Section 5. *Connor* v. *Johnson*, 402 U.S. at 691.

large districts. In that case, the Dallas City Council had adopted a voting system of three at-large and eight single-member districts to remedy a wholly at-large election plan that unconstitutionally diluted the votes of black citizens (*id.* at 538 (plurality opinion)). A divided Court held that the proposal was legislative, and, therefore, was not subject to the presumption in favor of single-member districts.

Justice White, joined by Justice Stewart, announced the Court's judgment and wrote an opinion stating that the city council had validly exercised its legislative powers, so that the plan was a "legislative" one in which at-large members were permissible (437 U.S. at 544).[10] Justice White distinguished *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976) (per curiam), in which the Court had rejected remedial plans prepared by local bodies that included multimember districts (437 U.S. at 545), by noting that in *East Carroll* "the bodies which submitted the plans did not purport to reapportion themselves" and that they "could not even legally do so," because the Attorney General had refused to grant preclearance under Section 5 of the Voting Rights Act (42 U.S.C. 1973c) to the state legislation purporting to give them such authority (437 U.S. at 545). Thus, "the mere act of submitting a plan was

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[10] Justice White rejected the argument that "the city was without power to enact the ordinance because the at-large system declared unconstitutional was established by the City Charter and because, under the Texas Constitution, and Texas statutory law, the Charter cannot be amended without a vote of the people" (437 U.S. 544 (citations omitted)). The lower courts had found, as a matter of Texas law, that "once the Charter provision was declared unconstitutional, * * * the Council was free to exercise its legislative powers which it did by enacting the eight/three plan" (*ibid.*; see also *id.* at 544 n.8)).

not the equivalent of a legislative Act of reapportionment performed in accordance with the political processes of the community in question" (*ibid.*).

Justice Powell wrote an opinion concurring in part and concurring in the judgment, joined by Chief Justice Burger and Justices Blackmun and Rehnquist (437 U.S. at 547-549). While agreeing that the Dallas plan was a "legislative" plan, Justice Powell disagree with the conclusion—that he attributed to Justice White—"that a proposed reapportionment plan cannot be considered a legislative plan if the political body suggesting it lacks legal power to reapportion itself" (*id.* at 548). Justice Powell relied on *Burns* v. *Richardson*, 384 U.S. 73 (1966), in which the Court had deferred to the remedial plan of the Hawaii legislature that included multimember districts even though the legislature lacked power under state law to reapportion itself. Justice Powell concluded that "the plan proposed by the Dallas City Council in this case must be considered legislative, even if the Council had no power to reapportion itself" because "[t]he essential point is that the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court" (437 U.S. at 548).[11]

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[11] Justice Powell distinguished *East Carroll Parish School Bd.* v. *Marshall, supra,* as "turning on its peculiar facts" (*id.* at 549). In *East Carroll,* the Attorney General's disapproval of state legislation authorizing at-large elections "meant that the specific plans proposed by the school board and police jury in that case would have had unlawful effects" (*ibid.*). Thus, "the normal presumption of legitimacy afforded the balances reflected in legislative plans could not be indulged" (*ibid.* (citations omitted)).

In the dissent in *Wise,* Justice Marshall, joined by Justices Brennan and Stevens, found that *East Carroll Parish School*

Three years later, in *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), the Court addressed the distinction between a legislative plan and a court-ordered plan in the Section 5 context. There, the voting plan for the Commissioners Court in Kleberg County, Texas, had been invalidated under one person, one vote principles (*id.* at 133-134). The Commissioners retained an expert who, at their instruction, developed a reapportionment plan that was then proposed to the federal court as a remedy (*id.* at 134-135). The Court found the plan to be a legislative one requiring preclearance under Section 5 before submission to the district court (*id.* at 153). The Court held that the requirement of preclearance "is not dependent upon any showing that the Commissioners Court had authority under state law to enact the apportionment plan at issue in this case" (*id.* at 152 (footnote omitted)).

In analyzing the applicability of Section 5, Justice Stevens, writing for seven members of the Court, relied on Justice Powell's opinion in *Wise* v. *Lipscomb*, *supra*, for the proposition that "the Commissioners Court's power under Texas law to adopt this plan

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Bd. v. *Marshall*, *supra*, led necessarily to the conclusion that the plan before the Court was judicially devised (*Wise*, 437 U.S. at 550-554). Justice Marshall contended that the council in *Wise* had proposed its plan "less as a matter of legislative judgment than as a response by a party litigant to the court's invitation to aid in devising a plan" (*id.* at 552) and maintained that past decisions did not "contemplate[] that a legislature could meet this responsibility [to enact a remedial plan] * * * by making a submission not in accordance with valid state procedures governing legislative enactments" (*id.* at 553 (footnote omitted)). He further argued that the Dallas plan was improper, even if legislative, because the use of multimember districts tended to dilute black voting strength (*id.* at 554-555).

should be irrelevant to the decision in this case" (452 U.S. at 146).

> As Justice Powell pointed out in *Wise* v. *Lipscomb*, * * * the essential characteristic of a legislative plan is the exercise of legislative judgment. *The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic.* The applicability of § 5 to specific remedial plans is a matter of federal law that federal courts should determine pursuant to a uniform federal rule.

(452 U.S. at 152 (emphasis added)).[12]

We believe that *Wise* and *McDaniel*, read together, strongly suggest that a plan should be viewed as legislative rather than judicial in origin—for purposes of both Sections 2 and 5—when it clearly embodies "policy choices of the elected representatives of the people" (*Wise*, 437 U.S. at 548 (Powell, J., concurring)). In *Wise*, six Justices agreed that the reapportionment plan adopted by the Dallas City Council was a legislative plan—Justice White and one other reasoning that the local body had authority to enact it and thus not deciding whether in every in-

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[12] The contention was made by the petitioner in *McDaniel* that the plan in issue was not legislative because "the Commissioners Court was without power to adopt the particular apportionment plan at issue in this case because it is permitted to redraw the boundaries of *election* precincts only in a July or August term," and the proposal was made during November (452 U.S. at 152 n.34 (emphasis in original)). The Court did not resolve the state law objection because of its holding that it was "irrelevant for purposes of § 5 coverage," but noted that "it is clear that the Commissioners Court possesses general authority to reapportion itself; petitioners challenge only the timing of the submission and adoption of the plan in this case" (*ibid.*).

stance such authority was necessary (437 U.S. at 544); and Justice Powell and three others reasoning that the existence of such authority was not necessary (*id.* at 547-549). Justice Powell's conception of what makes a plan legislative in origin was expressly adopted by seven members of the Court in *McDaniel*, albeit in the context of the Act's Section 5 preclearance requirement.

While the consequences of identifying a plan as legislative are very different in the remedial and preclearance contexts, there are good reasons for believing that the essential characteristics of a legislative plan should not vary on that basis. In both settings a court must determine whether a plan represents "a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court" (*Wise*, 437 U.S. at 548 (Powell, J. concurring); see *McDaniel*, 452 U.S. at 153). The use of one standard for both sections of the Voting Rights Act will ensure that if a mixed plan is submitted for preclearance despite the proposing body's lack of authority to adopt it under state law, it will not, in every instance, be summarily rejected by the federal court precisely because of those state law issues. Moreover, deferring to a local plan despite possible state law objections removes from voting rights litigation a distracting issue that is not central to any federal policy, evades ready and consistent resolution, and is not in an area to which the federal courts bring any particular expertise.

3. Besides this case, there are to our knowledge only two other post-*McDaniel* court of appeals decisions that have addressed this issue. One of them was subsequently vacated on other grounds and no

longer has the force of law.[13] The other is the per curiam decision of the en banc Fifth Circuit in *LULAC* v. *Midland Independent School Dist.*, 829 F.2d 546 (1987). The court there rejected a local school board's reliance on *McDaniel*, and relied instead on Justice White's opinion in *Wise* v. *Lipscomb*, *supra*, in holding that the federal court need not defer to the plans proposed by the defendant school board (829 F.2d at 547-548). The court emphasized, however, that the school board's voting plans had either three or five seats out of seven elected at-large, and pointed out that those configurations were "contrary" to a state law requiring "no fewer than 70% of the board members to be elected from single-member districts" (*id.* at 547-548). Thus, in essence, the court held that the remedial plans were

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[13] The Fifth Circuit's decision in *McMillan* v. *Escambia County*, 688 F.2d 960 (1982) (holding that no deference was owed to a plan proposed by a body without authority under state law), came after *McDaniel* but did not cite that case, and the judgment was later vacated by this Court for reconsideration on the merits in light of the amendments to Section 2 (466 U.S. 48 (1984)). The Court expressly declined to decide the propriety of the court of appeals' remedial order (*id.* at 52 n.6).

On remand to the district court, the court found that *McDaniel* had "adopted Justice Powell's view, as set forth in his concurring opinion in *Wise*" (559 F. Supp. 720, 724 (N.D. Fla. 1983)), and that "Justice Powell's concept as a principle has equal force whether it is applied in a voting dilution suit or in a section 5 preclearance suit" (*ibid.*). The district court declined to implement the county's mixed five/two plan, however (*id.* at 725). The court found that the proposed plan would allow "blacks * * * an opportunity to elect 14% rather than 20% of the commission's membership," which would not remedy the dilution of the 20% black population's vote (*ibid.*). Moreover, at the time, Florida law did not permit a non-charter county to have a seven member commission, and the voters had rejected a change to charter status (*ibid.*).

not entitled to deference in their inclusion of a greater percentage of at-large seats than permitted by state law. The court of appeals in *Leon County* did not face that issue, nor does its opinion require deference to a proposed plan that actually violates state law in its configuration.[14] Thus, petitioner's contention (Pet. 17-20) that there is currently a conflict between decisions of the courts of appeals overlooks the differences between *LULAC* and this case, as well as the possibility that the circuits will arrive at consistent results on the remedial issues that were presented in the two cases.[15]

4. In general, a local governmental body's lack of authority to redistrict itself should not prevent the district court from treating that body's proposal as a legislative plan. However, some situations involving state law violations may well impair the validity of a proposal of a local body as a "reflect[ion] [of] the policy choices of the elected representatives of the people" (*Wise*, 437 U.S. at 548 (Powell, J. concurring)). In those limited situations, the federal

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[14] Florida law permitted the five/two mixed plan that respondents proposed (Supp. App. 25).

[15] A few district court opinions have discussed the conditions for deference to a legislative plan, and none is inconsistent with this case. See, *e.g.*, *Farnum* v. *Burns*, 561 F. Supp. 83, 92 n.13 (D.R.I. 1983) ("the plan at issue [in a legislative reapportionment] was drafted by a legislative consultant under the direction of a legislative body. The defendants' plan reflects the policy choices of the elected representatives and therefore must be considered as a legislative plan"); cf. *Ketchum* v. *City Council*, 630 F. Supp. 551, 563 n.25 (N.D. Ill. 1985) (approving a proposed plan not because a large majority of council members had intervened as plaintiffs and supported it, thus making it a legislative plan entitled to deference, but because it represented a valid compromise among most of the parties).

court would be justified in rejecting the local bodies' proposal as a legislative plan. We believe that such situations are highly exceptional. Further, if minor state law objections to legislative plans were routinely injected into the remedial phase of each voting case, the advantages of a clear test would be lost,[16] and the federal courts would be forced to play an inappropriate role of reviewing state law compliance in order to formulate remedial reapportionment plans.

No factor appears to be present here that would justify rejection of the Leon County plan.[17] To begin with, petitioners conceded that Leon County's plan complied with Section 2.[18] Moreover, respondents' plan is one of two configurations explicitly contem-

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[16] Cf. *McDaniel* v. *Sanchez*, 452 U.S. at 152 n.34 (alleged question of plan's compliance with state law was based on the adoption of the plan in November and its approval by the district court in January, when the local body arguably had power to redraw election precincts only during July or August).

[17] Respondents here were in a very similar situation to that of the Dallas City Council in *Wise* v. *Lipscomb*, *supra*. In *Wise*, the Council had no express authority to reapportion itself without amending the City Charter by a popular vote (437 U.S. at 544 (Opinion of Justice White)). In this case, Leon County had no authority to change its election system without a referendum. Thus, Justice Powell's conclusion that the "rule of deference to local legislative judgments remains in force even if * * * our examination of state laws suggests that the local body lacks authority to reapportion itself" (*id.* at 548), applies equally in this case.

[18] We express no opinion whether the record supports that conclusion. This Court has observed that "[o]f course, the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge" (*White* v. *Weiser*, 412 U.S. 783, 797 (1973)).

plated by state law, and thus, unlike the plan in *LULAC* v. *Midland Independent School Dist.*, *supra*, does not utilize more at-large seats than state law allows.[19] The state law deficiency here is that the required referendum has not been held. As the district court found (see Supp. App. 26 n.1), the record does not support the conclusion that the voters have in any sense rejected the idea of a mixed plan. Cf. *McMillan* v. *Escambia County*, 688 F.2d 960, 970-973 (5th Cir. 1982) (affirming district court's holding that a mixed plan that had been rejected by voters in a referendum was not entitled to deference when resubmitted to the court by a legislative body without independent authority to reapportion itself), vacated on other grounds, 466 U.S. 48 (1984). Finally, there is no suggestion of an invalid motive behind respondents' proposed plan.[20]

Respondents' proposal thus appears to reflect "the policy choices of the elected representatives of the people" (*Wise*, 437 U.S. at 548 (Powell, J., concurring), and the court therefore properly accepted it. Certainly, that proposal better reflects the wishes and interests of the electorate than would a plan devised

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[19] A violation of state law relating to the substantive configuration of a plan raises different and more serious problems than are present when a required referendum has not been held. When a local legislative plan violates state law by containing more at-large seats than state policy permits, the rationale for a federal court to allow at-large seats in legislative plans—to defer to state policy about at-large districting (*Chapman* v. *Meier*, 420 U.S. 1 (1975))—is absent.

[20] Nor is the absence of state law authority for respondents to propose a plan due to the invalidation of such enabling legislation as an abridgement of federal voting rights. See *East Carroll Parish School Bd.* v. *Marshall*, *supra*.

by a federal court.[21] Because there is no suggestion that respondents' plan does not protect federal interests in voting rights, federal interests would not be served by declining to defer to the local legislature's inclusion of at-large seats.

5. While a grant of certiorari in this case would allow the Court to clarify an issue that has caused some analytical confusion in the lower courts, we believe that the Eleventh Circuit has reached the correct result here and that review at this time is not otherwise necessary. Courts have not in our experience regularly been faced with the peculiar situation presented here—*i.e.*, a legislative plan including at-large seats proposed by elected officials who are unable to enact that plan. Even where that situation arises, before a court can defer to a plan employing at-large seats, the plan must itself pass muster under Section 2.[22] It therefore appears that there is no substantial need for this Court's review of the issue at the present time.

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[21] In addition, after the remedial plan has been implemented, the state may change the election system as long as the new method does not violate federal voting protections. The order of the federal court is not intended permanently to displace state-enacted reapportionment plans or local election plans that themselves comply with the Voting Rights Act and the Constitution. See, *e.g.*, *White* v. *Weiser*, 412 U.S. 783, 794-795 (1973).

[22] See, *e.g.*, *United States* v. *Dallas County Comm'n*, 850 F.2d 1433 (11th Cir. 1988) (holding that remedial election plan including four single-member districts and one at-large seat, proposed to replace invalid at-large election system, failed to comply with Section 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
MARK L. GROSS
Attorneys

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